LING SONG PING

v.

KOAY AH TOO

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 32-3-1988]
[ORIGINATING SUMMONS NO. 24-976-89]
14 OCTOBER 1991

CONTRACT: *Construction - Conflicting clauses in trust deed - Repugnancy - Interpretation of - Literal rule - Golden rule - Intention of parties to be gathered from the document - Court can disregard words in a contract.*

The plaintiff owner of a piece of land executed 2 documents in favour of the defendant, namely a trust deed and a power of attorney; under the latter the land had been registered in the name of the defendant.

Clause 4 of the trust deed provided that if the plaintiff desired to repossess the said land he was to pay compensation of RM40,000 to the defendant. Clause 5 however provided that if the plaintiff was deprived of the ownership or interest of the said land, the plaintiff was to pay the defendant the prevalent market value of the land.

The plaintiff sought to reclaim the land and offered to pay RM40,000 in pursuance of Clause 4 of the trust deed. The defendant on the other hand insisted on Clause 5 and claimed the prevalent market value.

Held:

[1] The literal rule of interpretation allowed the repugnancy between Clause 4 and 5 to persist. Therefore the golden rule had to be employed to resolve the conflict. The Court would have to collect the intention of both parties from the whole of both documents taken together.

[2] The trust deed although entitled as such was nothing more than a contract by the plaintiff to sell to the defendant the land with an option to the plaintiff to buy it back at market value and the word 'compensation' meant valuable consideration for compensation in its more appropriate sense, and had by the recital to the trust deed, already been paid by the defendant to the plaintiff for taking over the land; the valuable consideration should mean the market value.

[3] The Court can reject any part of any document that does not accord with real intention which is not necessarily the expressed intention of the parties. Therefore the phrase " in Clause 4 of the trust deed is rejected so that the market value can be assessed.

[Order accordingly.]

Cases referred to:
Adamstos Shipping Co. Ltd. v. Anglo Saxon Petroleum Co. Ltd. [1959] AC 133 ***(foll)***
Glynn v. Margetson Co. [1893] AC 351 ***(foll)***
Malaysia Credit Finance Bhd. v. Yap Hock Choon & Anor. [1989] 2 MLJ 362 ***(foll)***

Legislation referred to:
Carriage of Goods by Sea Act 1936 [USA], s. 5

For the plaintiff - Daljit Kaur; M/s. Lim Him Wee & Co.

For the defendant - Almeida; M/s. Almeida & Co.

JUDGMENT

Peh Swee Chin J:

The plaintiff successfully applied for a piece of State land of about 8 acres in a land scheme called Rancangan Tanah Terkawal Raja Hitam II, Mukim of Sitiawan, Perak and he executed 2 documents in favour of the defendant; namely, a trust deed and a power of attorney with the defendant stated therein as beneficiary and attorney respectively.

Both the trust deed and the power of attorney are set out below for case of reference.

This Declaration of Trust is made on 15 November 1975.

Whereas Koay Ah Too @ Koay Chiew Eng, I.C.No. 1053742 of No. 160, New Village, Ayer Tawar, Dindings (hereinafter called 'the trustee') has applied for and has been alienated by the Government of the state of Perak a piece of State Land as Lot No. 11927 at Rancangan Tanah Terkawal Raja Hitam II Mukim of Sitiawan.

And Whereas the said trustee is not able to maintain the said land for cultivation.

And Whereas the said trustee has been paid compensation by Ling Song Ping, I.C. No. 8096035 of No. 20, Main Road, Changkat Kruing, Dindings for the trouble taken by him in making the application for the said land and cultivating the same with rubber and for the expenses incurred.

And Whereas in consideration of such compensation the said trustee has agreed that the said Ling Song Ping will take over the said land on the conditions hereinafter appearing.

Now These Presents Witness:

1. I, Koay Ah Too @ Koay Chiew Eng the above named trustee, hereby declare that I hold the above mentioned Lot No. 11927 upon trust for the said Ling Song Ping.
2. I will not transfer or assign the said land except to the said Ling Song Ping or his nominee if and when practicable without any further payment as compensation or otherwise.
3. All benefits and produce derived from the said land shall belong to the said Ling Song Ping.
4. Should the trustee desire to repossess the said land he shall pay compensation to the said Ling Song Ping in the sum of dollars forty thousand only (RM40,000/-).
5. In the event of the said ling Song Ping being deprived of the ownership or interest of the said land under any circumstances, the trustee shall pay to the said Ling Song Ping Compensation to be ascertained on the prevalent market value of the land.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

Signed, Sealed and)
Delivered by the)
said Koay Ah Too @) Sgd.
Koay Chiew Eng in)
the presence of :)

sgd.
Peguambela & Peguamcara
Sitiawan.

Power of Attorney

Know All Men By These Presents that I, Koay Ah Too @ Koay Chiew Eng, I.C. No. 1053742 of No. 160, New Village, Ayer Tawar, Dindings in the State of Perak do hereby nominate and appoint Ling Song Ping I.C. No. 8096035 of No. 20, Main Road, Changkat Kruing, Dindings in the State of Perak to be attorney for me and in my name or otherwise to do all or any of the following things in respect of my land known as Lot No. 11927 at Rancangan Tanah Terkawal Raja Hitam II Mukim Sitiawan in the District of Dindings:

1. To act on my behalf and represent me in all my dealings with Government of Perak concerning all my rights and interest in the said Lot No. 11927.
2. To receive the issue document of title or qualified title to the said land from the Collector.
3. To enter into occupation of the said land allotted to me and to manage the same.
4. To pay all quit rents, assessments and other taxes in respect of the said land.
5. To apply to the Ruler-in-Council for leave to transfer the said land.
6. To transfer the said land and to sign and execute a registrable transfer of the same.
7. To recover and receive all monies, rents and whatever payments due to me in respect of the said land and upon receipts and recovery of the same to grant sufficient releases and discharges thereof.
8. To appear before any Officer or Government Authorities in connection with any of the matters herein contained.
9. To substitute and appoint from time to time one attorney or attorneys with the same or limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint.
10. It is hereby declared that this Power of Attorney is given for valuable consideration and is irrevocable.

And Generally to do all acts and things and sign and execute all whatsoever documents as may be necessary for effectuating any of the purpose aforesaid as fully and as completely as I myself could do if personally present.

And I hereby agree to ratify and confirm all and whatsoever my said attorney or other substitute or substitutes shall lawfully do in the premises by virtue of these presents.

In Witness whereof I Have hereunto set my hand and seal this 15 November 1975.

Signed, Sealed and)
Delivered by the)
said Koay Ah Too @) Sgd.
Koay Chiew Eng in)
the presence of:)
Sgd.

Peguambela & Peguamcara

I, Goh Cheow Choon Advocate and Solicitor of the High Court in Malaya, practising at Sitiawan, Perak hereby certify that the signature of the donor above named was written in my presence on 15 November 1975 and is according to information given to me by trustworthy and respectable persons, namely Nga Ing Sing and Wong Chok Chiw both of 26, Jalan Bruas, Sitiawan which information I verily believe the true signature of Koay Ah Too @ Koay Chiew Eng who has acknowledged to me that he is of full age and that he has voluntarily executed this instrument.

Witness my hand:

Sgd. Sgd.

... ...

Peguambela & Peguamcara
Sitiawan

Sgd.

...

With the use of the power of attorney, as on the date of hearing before me, the land had been already registered in the name of the defendant.

The plaintiff sought (a) to reclaim the land on his payment of RM40,000 in pursuance of Clause 4 of the trust deed above; (b) revocation of the power of attorney, and (c) the removal of the caveat lodged by the defendant against the land.

The defendant did not dispute the entitlement of the plaintiff to claim back the land, but insisted on Clause 5 of the trust deed which provided for the payment of market value of the land by the plaintiff to the defendant, not the sum of RM40,000 as stated in Clause 4, and as contended for by the plaintiff.

The difference between the parties herein was the difference between the sum RM40,000 and the market value of the land; though learned Counsel for the defendant made a very feeble attempt to say that it was unfair for the plaintiff to claim the land and that the conduct of the plaintiff had estopped him from claiming the land. This submission in a sentence or two with no further elaboration was made less than half-heartedly, running counter to the defendant's own affidavit. The Court regarded this submission in the circumstances as not amounting to any issue for the decision.

It was clear to the Court that there were two conflicting provisions in the trust deed as regards the sum of RM40,000 in Clause 4 on the one hand and the market value in Clause 5 on the other and in this connection, the words "to repossess" the land in Clause 4 from the defendant were just another way of saying the deprivation of the ownership of the saying the deprivation of the ownership of the land of the defendant under one of the "any circumstances" in Clause 5 of the trust deed.

Faced with these 2 conflicting provisions as regards the monetary recompense the Court thought of the maxim that *res magis valeat quam pereat*, but this really posed no problem for both parties were impliedly with one voice that the trust deed was valid; consonant with the Court's view that it was unquestionably so except for the repugnancy which had to be resolved as seemingly desired by both parties.

Applying the literal rule, that is according to the ordinary and popular meaning of the words in Clauses 4 and 5 would allow the repugnancy to persist. The literal rule would have to be departed from in this case and the golden rule, be employed in modifying the Clauses 4 and 5 to resolve the conflict between them.

To do so, in my view, the Court would have to collect the intention of both parties from the whole of both documents taken together. The intention the Court collected was as follows. The trust deed conveniently called a trust deed for reasons best known to the parties, was nothing more than a contract by the plaintiff to sell to the defendant the land with an option to the plaintiff to buy it back at market value, if the plaintiff so desired. The word "compensation" mentioned in Clause 4 should mean no more than some valuable consideration, and for compensation in its more appropriate sense, had by the recital to the trust deed, already been paid by the defendant to the plaintiff for taking over the land. Valuable consideration should mean the market value.

The Courts have for a very long time, been prepared to reject any part of any document that does not accord with the real intention which is not necessarily often the expressed intention or the parties.

Thus in *Adamstos Shipping Co. Ltd. v. Anglo Saxon Petroleum Co. Ltd.* [1959] AC 133, both parties signed a charterparty which contained a clause called the "paramount" clause and the clause stated: "The bill of lading shall have effect subject to the Carriage of Goods by sea Act of the United States 1936 which shall be deemed to be incorporated herein ... ". The American Act was based on Hague conventions which shipping industry was found to rely on very often.

Two things happened. The Court found it was an undoubted charterparty from the document, and not a bill of lading and the words "This bill of lading" were rejected. The next thing that happened was that s. 5 of the American Act provided it should not apply to charterparties but to bills of lading. The House of Lords also held that this s. 5 should be rejected as meaningless and the American Act should be applied *mutatis mutandis*, causing Lord Reid, a member of the Appellate committee to remark that that case raised in an acute form how far a Court was entitled to go to disregard words in a contract. Please see also *Glynn v. Margetson Co.* [1893] AC 351 and *Malaysia Credit Finance Bhd. v. Yap Hock Choon & Anor.* [1989] 2 MLJ 362.

I therefore reject the phrase "in the sum of dollars forty thousand only" in Clause 4 of the trust deed so that the market value could be assessed. I therefore made the order on the following terms:

It is ordered that:

(1) the land in question be retransferred by defendant to the plaintiff on the following conditions,

(2) an enquiry be held before the Registrar of this Court to determine the market value of the land in question,

(3) upon such enquiry, that plaintiff should pay such sum as representing the market value to the defendant within 3 months from the ascertainment of the said market value of the learned Registrar and upon such payment the defendant shall execute a valid and registrable transfer of the said land to the plaintiff at the cost and expense of the plaintiff simultaneously or as soon as possible, but not later than one week from the receipt of the said sum,

(4) the possession of the said land shall be given forthwith on payment to the plaintiff of the sum representing the said market value,

(5) that defendant do pay ½ of the costs of this action, and

(6) that the caveat in question and that the deed of power of attorney be hereby withdrawn or revoked as the case may be.

Also found at [1992] 1 CLJ 157